STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 6, 2003
v	No. 237511 Eaton Circuit Court
TERESA KAY PERRIER, Defendant-Appellant.	LC No. 00-020447-FH

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant,	
v	No. 238711 Eaton Circuit Court
TERESA KAY PERRIER, Defendant-Appellee.	LC No. 00-020447-FH

Before: Donofrio, P.J., and Saad and Owens, JJ.

PER CURIAM.

A jury convicted defendant, Teresa Kay Perrier, of operating a motor vehicle while under the influence of a controlled substance causing death (OUI causing death), MCL 257.625(4). The trial court sentenced defendant to probation for five years, with the first 365 days to be served in jail.[1] In these consolidated appeals, defendant appeals her conviction, and the prosecutor appeals the sentence imposed by the trial court. We affirm the conviction, but remand to the trial court for resentencing.

I. Facts

[1] The trial court also imposed miscellaneous fines and costs. Further, while these claims of appeal were pending, the trial court entered an order reducing defendant's sentence by thirty days, pursuant to MCL 801.257.

On April 27, 2000, defendant drove her car erratically and, as a result, collided with a car driven by Jean Arps, whose mother, Frieda Arps, a passenger, was killed.

II. Instructions

Defendant says that the trial court failed to adequately instruct the jury on the knowledge requirement for the crime of OUI causing death. "The determination whether a jury instruction is applicable to the facts of the case lies within the sound discretion of the trial court." *People v Ho*, 231 Mich App 178, 189; 585 NW2d 357 (1998). However, questions of law are reviewed de novo. *People v Melotik*, 221 Mich App 190, 198; 561 NW2d 453 (1997). This Court reviews jury instructions in their entirety to determine if there is an error that requires reversal. *People v Daniel*, 207 Mich App 47, 53; 523 NW2d 830 (1994). Instructions must cover each element of each offense charged, and all material issues, defenses, and theories that have evidentiary support. *Id.*

The trial court instructed the jury that, to convict defendant, the jury must find that "defendant voluntarily decided to drive knowing she had consumed a controlled substance." This instruction substantially reflects CJI2d 15.11(5). Moreover, at trial, defense counsel expressly approved of this instruction. Soon thereafter, however, the jury asked the trial court to define "controlled substance." Defense counsel asked the trial court to provide a definition extracted from MCL 333.7104(2), but the trial court declined because the technical Public Health Code definition would confuse the jury. Instead, over defense counsel's continuing objection, the trial court instructed the jury that "prescribed medication is a controlled substance." The jury then asked if the words "prescribed medication" could be substituted for "controlled substance" for the knowledge element. Defense counsel suggested that the trial court "tell the jury that in regards to the question whether . . . they can substitute a prescribed medication for a controlled substance that they have enough information already regarding that issue for them to make that decision." The court accepted defense counsel's suggestions and instructed the jury accordingly.

Now, defendant argues that, by simply equating "prescription medication" with "controlled substance," the trial court effectively took one element from the jury. However, defense counsel affirmatively waived this issue because the trial court instructed the jury pursuant to defense counsel's suggestion that the court "tell the jury . . . that they have enough information already regarding that issue for them to make that decision." *People v Carter*, 462 Mich 206, 214-216; 612 NW2d 144 (2000).[2] We further observe that the relevant issue is whether defendant understood that she was taking medicine that was subject to heightened regulation, which rendered it illegal except as provided by law, not whether defendant was

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[2] Defense counsel's continuing objection regarding the statutory definition was extinguished by his later suggestion. Furthermore, the statutory language in MCL 333.7404(2) refers to substance classification schedules and still other statutory provisions, rendering that subsection of little use to the jury. Nevertheless, subsection (1) plainly equates "controlled substance" with one requiring "a valid prescription or order of a practitioner while acting in the course of the practitioner's professional practice . . . ." Therefore, the clarification that the trial court provided complied with the language of the statute.

familiar with, or might correctly have guessed at, the peculiarities of the legislative language governing such substances.[3] For these reasons, we reject defendant's claim of error.

III. Sufficiency of the Evidence

Defendant argues that the prosecutor presented insufficient evidence that defendant knowingly took a controlled substance, or that she was in fact under the influence of a controlled substance at the time of the accident. We disagree.

When we review the sufficiency of evidence in a criminal case, we view the evidence in the light most favorable to the prosecution to determine if a rational trier of fact could find that each element of the crime was proved beyond a reasonable doubt. *People v Jaffray*, 445 Mich 287, 296; 519 NW2d 108 (1994).

Again, defendant contends that because she did not know that her prescription pain medicine was, under the law, a "controlled substance," she should not be found guilty of violating MCL 257.625(4). Once again, we reject this argument. We do not read the statute to apply only to those who are acquainted with the term "controlled substance" as used by the Legislature. Defendant conceded that she took prescription pain medicine hours before the accident. Further, defendant's pharmacist testified that the bottles for defendant's prescription drugs routinely display warnings of the dangers of driving while under their influence. Moreover, a blood sample taken on the day of the accident revealed the presence of opiates and barbiturates consistent with defendant's prescription history. This evidence, and evidence of defendant's erratic driving, sufficiently established that defendant was under the influence of a controlled substance when the accident occurred.[4]

IV. False Testimony

At sentencing, the trial court judge stated that he believed defendant's doctor lied when he testified that he advised defendant not to drive every time he prescribed a narcotic for her.

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[3] In this case, the only prescription medicines under consideration were narcotic pain relievers. Thus, we do not consider a scenario in which a physician prescribes an over-the-counter medicine that does not constitute a controlled substance, or prescribes a controlled substance that does not ordinarily cause any form of intoxication (e.g., an antibiotic).

[4] Defendant suggests that the drugs may have been administered at the hospital after the accident. However, defendant cites no record evidence to show that medical personnel gave her any such medication. MCR 7.212(C)(7). In any event, the prosecution proved its theory beyond a reasonable doubt and it has no duty to disprove every reasonable theory of innocence. *People v Johnson*, 137 Mich App 295, 303; 357 NW2d 675 (1984).

Finally, defendant suggests that she took no more narcotic medication than the amount prescribed. Defendant cites no authority for the proposition that only those who surpass prescribed dosages of controlled substances may be guilty of driving while under their influence. Because MCL 257.625(4) does not provide such a limitation, we reject this argument. Indeed, we further observe that warnings on prescription medicine caution against driving when, as here, the contention is that defendant took the prescribed dosage.

Defendant maintains that her conviction should be reversed because it is a miscarriage of justice to be convicted on the basis of false testimony.

While the sentencing judge sits as trier of fact for purposes of sentencing, *People v Williams*, 191 Mich App 269, 276; 477 NW2d 877 (1991), in a jury trial, the jury alone serves as the factfinder on questions of guilt or innocence. "[A]bsent exceptional circumstances, issues of witness credibility are for the jury, and the trial court may not substitute its view of the credibility 'for the . . . jury determination thereof.'" *People v Lemmon*, 456 Mich 625, 642; 576 NW2d 129 (1998), quoting *Sloan v Kramer-Orloff Co*, 371 Mich 403, 411; 124 NW2d 255 (1963). Accordingly, a judge may grant a new trial based on the great weight of the evidence "only if the evidence preponderates heavily against the verdict so that it would be a miscarriage of justice to allow the verdict to stand." *Lemmon, supra* at 627. The present case does not meet this standard.

Notwithstanding the trial judge's comment, the jury may have believed that the doctor repeatedly warned defendant not to drive when he prescribed each narcotic. Alternatively, the jury may have concluded that the doctor cautioned defendant about driving, even if he failed to do so on each and every occasion he prescribed the medication. Finally, were the jury to disbelieve the doctor's testimony, evidence that the bottles were labeled with clear warnings about driving under their influence suggests that a separate warning would have been duplicative. In sum, were we to discount the doctor's assertion, the jury could have easily concluded that defendant knowingly drove while under the influence of narcotics.

V. Sentencing Departure

The prosecutor argues that the trial court erred in imposing a minimum sentence below the statutory guidelines[5] range without substantial and compelling reason. We agree. This Court reviews a trial court's sentencing decisions for an abuse of discretion. *People v Cain*, 238 Mich App 95, 130; 605 NW2d 28 (1999).

Though the recommended minimum guidelines range was twenty-nine to fifty-seven months in prison, the trial court sentenced defendant to one year in jail. A sentencing court which departs from the guidelines must state on the record its reasons for the departure, and may deviate only for "substantial and compelling reason . . . ." MCL 769.34(3). Here, the trial court offered the following reasons for its downward departure:

> 1) The defendant was on prescribed pain reduction at the time and not a street level controlled substance.
>
> 2) I have no reason to believe the Sentencing Commission had this type of situation in mind with these guidelines.
>
> 3) I don't believe the defendant appreciated and understood the effects of the medication she was taking and firmly believe the prescribing physician lied in his testimony regarding his instructions to that effect.

[5] See MCL 769.34.

4) This is a crime of unintended results and the guidelines fail to adequately take that factor into consideration.

5) Contrary to the Prosecutors' position I find the defendant to be extremely remorseful for her actions and the unintended results.

6) The defendant has a clear record in all respects.

7) The sentence of one year in the Eaton County Jail with lengthy probation meets with the approval of the victim[']s daughter [who] was driving the second vehicle involved—She writes "I feel the sentence you gave was very appropriate under the circumstances." [Underlining in original.]

Michigan law is well settled that a "substantial and compelling" reason for a sentencing departure from the guidelines must be objective and verifiable. *People v Babcock*, 244 Mich App 64, 74-78; 624 NW2d 479 (2000). Here, the factors articulated by the trial court fail to meet this standard. Our careful review of the seven factors articulated by the trial judge mandates our reversal of the court's downward departure. That defendant was under the influence of legal medication instead of "street" drugs is a distinction without a difference; the hazards of driving while impaired are the same regardless of the source or type of intoxicant. Had the Legislature intended to impose more lenient punishment for persons abusing legal, as opposed to illegal, controlled substances, it could easily have worded MCL 257.625(4) to say so. Furthermore, courts may not speculate about the possible intent of the Legislature beyond the words expressed in the statute. *In re Schnell*, 214 Mich App 304, 310; 543 NW2d 11 (1995). That defendant drove while under the influence of prescription drugs as opposed to "street" drugs is not a compelling reason for a downward departure, and speculation about an unstated Legislative intent regarding a difference in punishment is not objective and verifiable.[6]

Concerning the trial court's third factor, neither defendant's alleged subjective misunderstanding of the effects of her medicine, nor the veracity of her prescribing physician, constitute verifiable factors.[7] Further, the fault, if any, of the doctor does not mitigate the fault of

[6] Defendant argues that legislative intent can be objectively verified through legislative journals and annotations, but cites no such materials to support her claim. Aside from this failure of presentation, see MCR 7.212(C)(7), we need not look to statements by individual legislators or staff members to construe a statute that is plain on its face. See *Folands Jewelry Brokers, Inc v City of Warren*, 210 Mich App 304, 307; 532 NW2d 920 (1995) (the language of the statute itself is the primary indicator of legislative intent).

[7] We note that the trial court and both lawyers thoroughly reviewed the presentence investigation report at defendant's first sentencing hearing. Contrary to the trial court's finding that defendant did not understand or appreciate the effects of her medication, we observe that the presentence report specifically states that, at the time of the car accident, defendant had a significant history of using such medication. Specifically, the report states:

> When questioned, the defendant reported to be in good physical health. However, records received indicated that the defendant *got 30 prescriptions for Vicodin ES, Vicodin HP, Vicodin, Florinal, Tylenol ES, Stadol, and Fioricet with Codeine, between 11/23/99 and 4/26/00*. [Emphasis added.]

defendant; despite the myriad regulations governing prescription narcotics, a consumer bears personal responsibility for observing applicable warnings.

Furthermore, regarding the fourth factor, the trial court erred by imposing a lower sentence because the guidelines fail to take into account that OUI causing death is a crime of "unintended results." The crime of OUI causing death does not require an intent to kill. Rather, the Legislature intended to punish those who "acted knowingly in consuming . . . a controlled substance, and acted voluntarily in deciding to drive after such consumption." *People v Lardie*, 452 Mich 231, 256; 551 NW2d 656 (1996). The guidelines punish the crime accordingly. Thus, the trial court's observation that defendant did not intend to cause the victim's death is beside the point and certainly does not constitute a substantial or compelling factor justifying a downward sentencing departure.

We further note that the trial court's fifth factor -- finding that defendant is "extremely remorseful" -- is entirely subjective. A defendant's remorse, or lack thereof, is not generally objective and verifiable. *People v Daniel*, 462 Mich 1, 8 n 9; 609 NW2d 557 (1990), citing *People v Krause*, 185 Mich App 353, 358; 460 NW2d 900 (1990), overruled in part on other grounds by *People v Fields*, 448 Mich 58 (1995). Accordingly, absent objective manifestations that can be ascertained on appeal, a defendant's expressions of remorse do not provide a basis for departing from the recommended range under the sentencing guidelines. See *id.* at 69.[8]

Regarding the next cited factor, defendant's "clean" criminal record is obviously objective and verifiable. However, this factor is already considered in the guidelines scoring and defendant received zeros for her *prior record* variables. Therefore, defendant already benefited from her "clean" record. Because this was reflected in the recommended range for defendant's minimum sentence, defendant's lack of criminal history does not constitute an additional substantial and compelling reason for a downward departure.

Finally, the trial court's reliance on the personal feelings of Arps' daughter is neither an objective nor verifiable basis nor a substantial and compelling reason for a downward departure. Notwithstanding the surviving daughter's subjective magnanimity toward defendant, it is the Legislature that prescribes punishment and a sentencing court must operate within its legislatively authorized range of discretion. See, e.g., *People v Harding*, 443 Mich 693, 727; 506 NW2d 482 (1993), citing *Brown v Ohio*, 432 US 161, 165; 97 S Ct 2221; 53 L Ed 2d 187 (1977); *Wayne Co Prosecutor v Recorder's Court Judge*, 406 Mich 374, 391-392; 280 NW2d 793 (1979), overruled in part on other grounds *People v Robideau*, 419 Mich 458 (1984). See also *People v Hart*, 98 Mich App 273, 275; 296 NW2d 235 (1980).

Because the trial court failed to articulate substantial and compelling reasons for its sentencing departure that were objective and verifiable, we remand this case to the trial court for resentencing. MCL 769.34(11); *Babcock, supra*.

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[8] Defendant does not argue that such objective manifestations exist. She simply asserts, incorrectly, that the trial court's reliance on this factor constitutes harmless error.

Affirmed in part and remanded for resentencing. We do not retain jurisdiction.

/s/ Pat M. Donofrio
/s/ Henry William Saad
/s/ Donald S. Owens